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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 441.

GENERAL TRADING COMPANY, a corporation, doing business as MINNEAPOLIS IRON STORE,
Petitioner,

vs.

STATE TAX COMMISSION OF THE STATE OF IOWA,
Respondent.

RESPONDENT'S BRIEF.

JOHN M. RANKIN, Attorney General of the State of Iowa,
JENS GROTHE, Special Assistant Attorney General of the State of Iowa,
Attorneys for State Tax Commission of the State of Iowa, Respondent.

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RESPONDENT'S BRIEF.

I.

The decision of the Supreme Court of Iowa is reported in *State Tax Commission of Iowa* v. *General Trading Company*, Iowa ____, 10 N. W. (2) 659 (July 27, 1943). It has not appeared in the official Iowa reports.

II.

The jurisdiction of this court is invoked under the order of this court dated November 22, 1943, granting certiorari, (R. 27) under Section 237 (b), as amended, of the Judicial Code. Counsel for petitioner asserts that presumably the writ was granted because the decision below was in conflict

with the Supreme Court of Michigan in *Simpson, Inc.*, v. *Gundry*, 297 Mich. 403; 298 N. W. 81, and with a decision of the Supreme Court of Arkansas in *McLeod* v. *J. E. Dilworth Co.*, 171 S. W. (2nd) 62.

We cannot agree with our learned adversary that the writ in the case at bar was granted because of either of the above mentioned decisions. The *Simpson* case is clearly distinguishable from the case at bar. The Supreme Court of Michigan simply held that the Use Tax of that state did not apply to plaintiff under the peculiar facts of that case. The *McLeod* case is also definitely distinguishable from the case at bar. The Arkansas Supreme Court held that J. E. Dilworth Co. was not liable for sales tax to the state of Arkansas on sales consummated outside the territorial boundaries of that state. In other words, inasmuch as the tax was an excise levied on the sale of merchandise and it appearing that such sale took place in another state, the state of Arkansas was without authority to collect the sales tax from said company. It is obvious, of course, that there is a wide distinction between use tax and sales tax cases. In the latter, the tax is on the sale. In the former, the tax is on the use. In one, it is a tax upon an event occurring within the state. In the other, it is an attempt to levy a tax upon a transaction occurring outside the state. We sincerely contend that the *Simpson* and *McLeod* cases have no application whatever to the legal question involved in the instant case.

III.

STATEMENT OF FACTS.

The question presented is the validity of the Use Tax Law of Iowa as applied to petitioner. The Iowa Use Tax Law imposes an excise tax on the use of tangible personal property purchased for use in Iowa, at the rate of 2% of the purchase price of such property. The tax is imposed upon

every person using such property within Iowa until the tax has been paid to the County Treasurer, *to a retailer*, or to the State Tax Commission as provided in the Act. (Sec. 6943.103, Code of 1939.) Under the provisions of Sec. 6943.109, every retailer maintaining a place of business in Iowa and making sales of tangible personal property for use in Iowa is required by said section to collect the tax imposed from the purchaser at the time of making the sale, *whether such sale be made within or without the state.* Section 6943.112 provides:

> "The tax herein required to be collected by any retailer pursuant to sec. 6943.109 * * * and any tax collected by any retailer * * * shall constitute a debt owed by the retailer to this state."

Subsection 5 of Section 6943.102, Code of 1939, provides:

> " 'Retailer' means and includes every person engaged in the business of selling tangible personal property for use within the meaning of this chapter * * *"

Subsection 6 of said Section 6943.102 provides:

> " 'Retailer maintaining a place of business in this state' or any like term, shall mean and include any retailer having or maintaining within this state, directly, or by a subsidiary, an office, distribution house, sales house, warehouse or other place of business, *or any agent operating within this state under the authority of the retailer or its subsidiary, irrespective of whether such place of business or agent is located here permanently or temporarily, or whether such retailer or subsidiary is admitted to do business within this state pursuant to Chapter 386.*" (Chap. 386 contains the provisions with reference to permits to foreign corporations to do business in Iowa.)

The Supreme Court of Iowa held in the instant case that the italicized portion of the statute which we have last above set out, applied to petitioner. This question being the Iowa

Supreme Court's interpretation of our own statutes is not, of course, involved in this review.

It is conceded that petitioner is a foreign corporation being organized and existing by virtue of the laws of Minnesota with its principal place of business in St. Paul in that state; that it has never qualified to do business in the state of Iowa as a foreign corporation or otherwise under the Iowa statutes; that petitioner sent from the state of Minnesota into the state of Iowa, traveling salesmen who solicited orders for merchandise which were subject to acceptance or rejection at the home office of petitioner. Thus it will be seen that petitioner comes squarely within the definition of "retailer maintaining a place of business in this state", said term being defined by subsection 6 of Section 6943.102, Code of Iowa, 1939, as including "any agent operating within this state under the authority of the retailer * * * whether such * * * agent is located here permanently or temporarily, or whether such retailer * * * is admitted to do business within this state pursuant to Chapter 386."

Petitioner in its statement of facts asserts:

> "It is only necessary to add that this use tax law applies only to sales made without the state."

This, of course, is not a correct statement. Section 6943.103 specifically provides that the tax is imposed on the use in Iowa of all tangible personal property purchased for use in Iowa. Said section further provides that the tax is imposed upon every person using such property in Iowa until the tax has been paid. Section 6943.109 provides:

> "Every retailer maintaining a place of business in this state and making sales of tangible personal property for use in this state, not exempted under the provisions of section 6943.104 (subsection 1 of section 6943.104 exempts from the tax personal property used in Iowa where the gross receipts from the sale of such property are required to be included in the measure of the tax

imposed by Division IV of Chap. 329.3—Sales Tax Chapter) nor collectible under the provisions of section 6943.107 (Sale of Motor Vehicles) shall at the time of making such sales, *whether within or without the state*, collect the tax imposed by this chapter from the purchaser * * *"

In its statement of facts petitioner also asserts that it is not admitted to do business in Iowa and has no office, agent or place of business and does no business in that state. This, we also say, is not a correct statement. The Supreme Court of Iowa expressly found that petitioner was "a retailer maintaining a place of business in Iowa" and it is conceded that petitioner sent traveling salesmen into Iowa who solicited orders for goods to be shipped into Iowa. These agents, as representatives of petitioner were physically present within this state. They were here for the purpose of furthering their principal's business. They took orders on behalf of their principal subject only to rejection in the event that the customer's credit rating was not acceptable. These agents traveled upon our highways, lived in our hotel rooms and we may assume operated in this state vehicles belonging to their principal. May it be logically said, therefore, that petitioner had no agents or place of business in Iowa? May it be logically said that it did no business in Iowa? We think not.

It is also conceded that petitioner, through said agents, sold to Iowa users wholesale iron and steel and automobile accessories, such sales being made to persons living in Iowa who were not retailers but bought them for their own use in this state.

IV.

SUMMARY OF ARGUMENT.

The Iowa statutes designate the tax forming the basis for this controversy as a use tax. Such use tax is complementary to the sales tax. Such latter tax having been pro-

vided for by a statute passed by the 45th General Assembly (1934). The Iowa Use Tax was enacted by the 47th General Assembly (1937). It is obvious, of course that Iowa in no way attempts to impose this use tax upon petitioner who is the seller of the merchandise. The tax is imposed upon persons using such merchandise within this state. So far as this tax is concerned, the only thing that is required of petitioner is that if it maintains a place of business in Iowa that it collect the use tax from the user and remit same to the Tax Commission. The cases which we will hereinafter cite and quote from will abundantly demonstrate that this is an entirely lawful requirement. In imposing this duty upon petitioner, Iowa imposes no unconstitutional burden upon interstate commerce nor does it in any manner deprive petitioner of its property without due process of law. It is our contention that in order for petitioner to prevail in this case, several of the previous pronouncements of this court will have to be overruled.

V.

ARGUMENT.

(All Italics Supplied.)

Under this division, counsel for petitioner presents, we concede, an extremely ingenious argument. We are constrained to say, however, that when analyzed in the light of previous decisions of this court, it falls of its own weight. To us it seems clear indeed that the proposition argued by petitioner under this division has already been decided adversely to it. The cases that we now proceed to refer to and quote from will, we think, abundantly sustain our contention.

The first of these cases to which we invite the court's attention is *Monamotor Oil Co.* v. *Johnson, supra.* That case originated in the District Court for southern Iowa. Appellant, Monamotor Oil Co., sought a declaration that the laws

of Iowa laying a tax on motor vehicle fuel, violated state and constitutional provisions and an injunction against their enforcement by state officers. The General Assembly of the state, in order to raise revenue for the improvement of highways, imposed a license fee of 2¢ per gallon on all motor vehicle fuel "used or otherwise disposed of in this state for any purpose whatever" and directed that "any person using motor vehicle fuel within the state shall be liable for the fee herein provided for unless the same shall have been previously paid". By a later statute an additional license fee of 1¢ per gallon was imposed. The law defined "distributor" as "any person who brings into the state or who produces, refines, manufactures or compounds within the state any motor vehicle fuel to be *used within the state* or sold or otherwise disposed of by him within the state for use in the state". Appellants were an Arizona corporation engaged in the business of buying, manufacturing, blending and selling gasoline and kindred products *including the importation into Iowa* of gasoline by tank cars, trucks and other containers for sale to consumers and to dealers who sell to consumers. A temporary injunction issued, but a court of three judges upon final hearing, dismissed the suit. The case was carried to the Supreme Court of the United States on direct appeal. The U. S. Supreme Court, in holding untenable appellant's contentions said:

> "There is no substance in the claim that the statutes impose a burden upon interstate commerce * * * The appellant insists that the tax is a direct tax on motor vehicle fuel imported. The court below concluded that the law laid an excise upon the use of fuel for the propulsion of vehicles on the highways of the state. The state officials have administered the tax on this theory. We think this the correct view. The levy is not on property but upon a specified use of property. (Note applicability to case at bar.) *Altitude Oil Co.* v. *People*, 70 Colo. 452, 202 Pac. 180; *Standard Oil Co.* v. *Brodie*, 153 Ark. 114, 239 S. W. 753. It is not laid upon the im-

porter for the privilege of importing * * * but falls on the local use after interstate commerce has ended. (The sentence just quoted disposes of petitioner's contention so far as its burden theory is concerned) * * * *The statute in terms imposes the tax on motor vehicle fuel used or otherwise disposed of in the state. Instead of collecting the tax from the user through its own officers, the state makes the distributor its agent for that purpose. This is a common and entirely lawful arrangement. Nat. Bank* v. *Kentucky*, 217 U. S. 443, 454; *Pierce Oil Corp.* v. *Hopkins*, 264 U. S. 137; *Standard Oil Co.* v. *Brodie*, 153 Ark. 114."

In order to distinguish the above case from the instant case petitioner calls to the court's attention that in the former case, there was intrastate activity. Our answer to that claim is that this contention is not discussed or in any manner alluded to in the opinion. Manifestly the decision in the *Monamotor Oil Company* case was not based upon the fact that the foreign corporation may have been engaged in some intrastate business in Iowa. We maintain that the decision would have been exactly the same had the Monamotor Oil Company transacted no intrastate business in Iowa. This is manifest by the fact that in the *Felt & Tarrant* case which we will hereinafter discuss, the decision was based upon the *Monamotor Oil Company* case and, of course, there was not even any claim that there was any intrastate business transacted by Felt & Tarrant Mfg. Co. in the state of California. We say that the effect of the decision in the *Monamotor Oil Company* case was that where a foreign corporation ships its merchandise into another state, a use tax may be collected from such corporation upon the privilege of use of such property in the latter state. This is not a burden upon interstate commerce. How could this be so when "equality is the theme"? Nor does it violate the provisions of the 14th Amendment to the Constitution of the United States. Quoting further from the *Monamotor Oil Company* case, we set out the following:

"The statute obviously was not intended to reach transactions in interstate commerce, but to tax the use of motor fuel after it had come to rest in Iowa, and the requirement that the appellant as the shipper into Iowa shall, as agent of the state, *report and pay the tax on the gasoline thus coming into the state for use by others on whom the tax falls imposes no unconstitutional burden either upon interstate commerce or upon the appellant.*

"The method of imposition and collection of the tax does not deny the equal protection of the laws guaranteed by the Fourteenth Amendment. * * * The short answer to the contention is that the statutes properly construed lay no tax whatever upon distributors, but make of them mere collectors from users of motor vehicle fuel, and refund the tax only to that class of users upon whom no excise is intended to be laid. The distributor does not pay the tax; THE USER DOES. It cannot therefore be said that any tax is laid upon the appellant in case of another class of taxpayers."

The next case to which we invite Your Honors' attention is *Bowman* v. *Continental Oil Co., supra.* In that case a suit was brought by the Continental Oil Company against the Attorney General and others of the state of New Mexico to restrain the enforcement against the company, a distributor of and dealer of gasoline and other petroleum products in that state, of the provisions of an act of the Legislature imposing an excise tax of 2¢ on each gallon of gasoline sold or used and an annual license of $50.00 for each distributing station or place of business. The following summarizes the holding of this court in the *Bowman* case:

1. A state may impose an excise tax upon the use of gasoline by a dealer at his distributing stations in the operation of his auto, tank wagon and trucks employed in the business of distributing his wares for sale although the gas is the product of other states.

2. The excise tax imposed by New Mexico Laws, 1919, Chap. 93, upon the sale and use of gasoline according to the number of gallons sold and used, does not, as applied to domestic sales and use, infringe rights of

dealers of such products under the due process law and equal protection of the law clauses of the U. S. Constitution, 14th Amendment.

The *Bowman* case was also, as you recall, one of the cases upon which you based your decision in *Felt & Tarrant Mfg. Co.* v. *Gallagher*. We quote from the *Felt & Tarrant* case:

> "*Bowman* v. *Continental Oil Company* recognized the right of the state to require a distributor 'to render detailed statements of all gasoline received, sold or used by it, whether in interstate commerce or not, to the end that the State may the more readily enforce said excise tax to the extent that it has lawful power to enforce it as above stated'."

We call next to your attention the case of *Henneford* v. *Silas Mason Co.* wherein you upheld a Washington statute similar to the one now under consideration. You said:

> "The tax is not upon the operations of interstate commerce, but upon the privilege of use after commerce is at an end.
>
> "Things acquired or transported in interstate commerce may be subjected to a property tax, non-discriminatory in its operation, when they have become part of the common mass of property within the state of destination * * *. This is so, indeed, though they are still in the original packages * * *. For like reasons they may be subjected, when once they are at rest, to a non-discriminatory tax upon use or enjoyment * * *. A tax upon the privilege of use or storage when the chattel used or stored has ceased to be in transit is now an impost so common that its validity has been withdrawn from the arena of debate."

Upon these three cases alone, we say we could safely rest our case. We say in all sincerity our petitioner's contentions with reference to burden on interstate commerce and violation of the due process clause of the 14th Amendment to the U. S. Constitution have been decided adversely to it by said cases.

We assert that since the decision in these cases, there is no longer any doubt concerning the right of a state to require a foreign retailer to collect and remit use taxes upon all merchandise sold by it in such state. Such a requirement does not contravene the commerce clause of the U. S. Constitution nor does it deprive such retailer of its property without due process of law.

Fortunately, however, it is not necessary for us to rely upon the three cases which we have just quoted from. In a more recent case, to-wit: *Felt & Tarrant Mfg. Co.* v. *Gallagher*, decided January 30, 1939, every vestige of doubt concerning the questions involved in the instant case were definitely and finally removed from the arena of further debate. We say without any hesitancy, that only by overruling the case of *Felt & Tarrant* can this court render a decision contrary to the contentions of respondent herein. For the convenience of the court, we set out in parallel columns the facts in the *Felt & Tarrant Mfg.* case and the case at bar.

Felt & Tarrant Mfg. Co.	General Trading Co.
1. It was an Illinois corporation engaged in manufacturing and selling comptometers in that state and delivering these to purchasers in various parts of the Union.	1. It was a Minnesota corporation engaged in the business of dealing in wholesale iron and steel and automobile accessories which it sells among others to retailers in Iowa and also to persons living in Iowa who were not retailers, but bought them for their own use.
2. Carried on no intrastate operations in California.	2. Carried on no intrastate operations in Iowa.
3. Orders were taken by agents subject to acceptance or rejection by the home office in Illinois.	3. Agents took orders subject to acceptance or rejection by the home office in Minneapolis.

4. If order was accepted the machine was forwarded directly to the purchaser, or in order to secure reduced freight charges, large groups of machines were shipped to the general agent who made delivery to the respective purchasers. The only machines kept by plaintiff in California were those used as demonstrators.

5. Two general agents, each of whom was allotted a separate section of the state were engaged by Felt & Tarrant in the state of California. Under the employment contract the only compensation paid to the general agents consisted of commissions on sales made. Each general agent was given the privilege of employing sub-agents subject to the approval of plaintiff, also plaintiff agreed by the employment contract to pay the rent of an office for each general agent, provided the lease was first approved by it, such office to be used exclusively for furthering plaintiff's interstate business.

6. Plaintiff never qualified to do intrastate business in California.

7. Activities of plaintiff's agents were confined solely to promoting its interstate business. Said

4. If the order was accepted by the home office in Minneapolis, the wholesale iron and steel and automobile accessories were shipped directly to the purchaser in Iowa by delivery to common carriers either by truck or rail or by delivery to the U. S. Postal Department for transportation to such purchasers.

5. Sent traveling salesmen, "from time to time during the period aforesaid", from the state of Minnesota into the state of Iowa, who solicited orders for said merchandise, which orders were expressly subject to acceptance or rejection by defendant at its office in Minneapolis.

6. Defendant never qualified to do intrastate business in Iowa.

7. Activities of defendant's agents were confined solely to promoting its interstate business. Said

agents had no authority to represent plaintiff in any intrastate business activity. As a matter of fact had plaintiff carried on intrastate business it would have been in direct violation of the California law with reference to foreign corporations doing business in that state.

8. Plaintiff shipped no merchandise to California unless there was on file in its home office an approved order for same.

9. Plaintiff agreed to pay part of the traveling expenses incurred by each general agent, his sub-agents and demonstrators while traveling on business trips authorized by plaintiff and also to reimburse each general agent to the extent of part of the moneys advanced to a sub-agent and, in addition, in the amount of $40.00 per month toward the salary of a demonstrator.

10. The California statute defines "retailer" as including "every person engaged in the business of making sales for storage, use or other consumption or in the business of making sales at auction of tangible personal property owned by such person or others for storage, use or other consumption pro-

agents had no authority to represent defendant in any intrastate business activity. As a matter of fact had defendant carried on intrastate business it would have been in direct violation of the Iowa law with reference to foreign corporations doing business in this state.

8. Defendant shipped no merchandise to Iowa unless there was on file in its home office an approved order for same.

9. While it is not stated in any of the pleadings, it may be assumed, we believe, that defendant paid its traveling salesmen the expenses incurred by them while traveling on company business in this state. If such expenses were not paid as such, it may in any event be assumed that the salary or commissions paid were sufficiently large to cover these expenses.

10. The Iowa statute provides "'retailer maintaining a place of business in this state' shall mean and include any retailer having or maintaining within this state * * * any agent operating within this state under the authority of the retailer whether such agent is located here permanently or temporarily * * *."

vided, however, that when in the opinion of the board, it is necessary for the efficient administration of this Act to regard any salesmen, representatives, peddlers or canvassers as the agents of the dealers, distributors, supervisors or employers under whom they operate or from whom they obtain the tangible personal property sold by them, irrespective of whether they are making sales on their own behalf or on behalf of such dealers, distributors, supervisors or employers, the board may so regard them and may regard the dealers, distributors, supervisors, or employers as retailers for the purposes of this Act. The Act also requires every retailer maintaining a place of business in the state, and making sales of tangible personal property for storage, use or other consumption in the state not exempted under the law to collect the tax imposed by the Act from the purchaser.

Petitioner attempts to distinguish the instant case from that of *Felt & Tarrant*. We say in all sincerity that this cannot be done. In principle, these two cases, we contend, are identical. Petitioner in its brief and argument contends that there was intrastate activity in the *Felt & Tarrant* case, its exact words being (p. 8):

> "In all these cases the corporation was actually doing business in the state."

We deny that statement. On the contrary, this court in deciding the *Felt & Tarrant* case expressly found and determined:

> "Plaintiff has never qualified to do intrastate business in California."

Certainly it must be presumed that if plaintiff was not qualified to do intrastate business that it would not in violation of law engage therein. There is not one scintilla of evidence that the Felt & Tarrant Mfg. Company transacted any intrastate business in California. All of the activities of Felt & Tarrant Company's agents was confined exclusively to the promotion of their principal's interstate business. They had no authority whatever to transact any intrastate business. The only thing that they had a right to do was to take orders for comptometers and to transmit such orders to the home office in Illinois there to be accepted or rejected depending upon the credit rating of the prospective purchaser. If the credit rating of the person signing the order was found to be satisfactory, the machine was shipped, sometimes direct to the vendee and at other times, in order to secure reduced freight charges, in larger groups, to the general agent who made delivery to the respective purchaser. The only machines kept by plaintiff in California were those used as demonstrators. Hence, we find in reading the *Felt & Tarrant* case that the only machines shipped to California were those for which the company had an accepted order. The fact that the machines when shipped in larger groups were delivered to the purchasers by the general agent would make no difference, for it is elementary that delivery is an incident of interstate commerce and that such commerce does not end until delivery is complet d. In the *Felt & Tarrant* case, as Your Honors know, the identical contentions were made as in the case at bar. That is, (1) that the statute as construed and applied by the appellees to the appellant was repugnant to Art. 1,

Paragraph 8, Clause 3, of the Federal Constitution (Commerce Clause), and (2) that the threatened enforcement of the statute would deprive appellant of his property without Due Process of Law contrary to the 14th Amendment. In holding that these contentions were without merit you said:

> "The trial court thought that both contentions were foreclosed by what was said and ruled in *Bowman* v. *Continental Oil Co.*, 256 U. S. 642, 650, 65 L. Ed. 1139, 1145, 41 Sup. Ct. 606; *Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86, * * * and *Henneford* v. *Silas Mason Co.*, 300 U. S. 577. *And we agree with that conclusion.*"

Then follows setting out of excerpts from the three above mentioned cases. We humbly acknowledge that we may not comprehend the effect of the decision in the *Felt & Tarrant* case and the three earlier cases upon which it is based but we say in all sincerity that we can see no distinction whatever between these cases and the one at bar, particularly do we fail to perceive the slightest difference in principle between the *Felt & Tarrant* case and the one now before this court. Certainly the fact that the agents in the *Felt & Tarrant* case lived in California and maintained offices there is not a fact upon which any distinction may be based, when it appears without dispute that all that these agents were authorized to do was to promote their principal's interstate activities. The agents in the case at bar came into Iowa. It does not appear how long they were here except that the answer recites that:

> "Defendant from time to time sent traveling salesmen into Iowa."

Now, of course, we know that while they were here they lived in hotel rooms and undoubtedly transacted some of the company's business therefrom. For the time being, this room was the office of the General Trading Company in the state of Iowa. This room, while occupied by petitioner's

agents was protected by the police officers of this state, by the fire departments of this state and we say that for this and other privileges extended petitioner, Iowa had a right to exact a price. What was the price? That it collect and transmit to the state of Iowa the use tax on all merchandise sold by it in this state through said agents. In order to distinguish the instant case from the *Felt & Tarrant* case, we must, as we see it, hold that merely because the agents of the foreign retailer in the case at bar lived here temporarily instead of permanently, makes the cases distinguishable. We cannot believe that this would be a sound distinction. Nor do we think that the fact that the agents in the *Felt & Tarrant* case maintained offices in California, makes the cases distinguishable. These offices were used for the sole and only purpose of promoting the interstate business of Felt & Tarrant.

Therefore, we say that if under the California statute which in all material respects is identical to ours, the foreign retailer could be required to collect use tax upon all comptometers sold by it in California without violating either the commerce clause or the due process clause of the Federal Constitution, then it should follow that the Iowa Use Tax statute should also be upheld as applied to petitioner.

Finally we call to the court's attention the recent case of *Nelson* v. *Sears Roebuck & Co., supra*, and *Nelson* v. *Montgomery Ward & Co., supra*. Those cases both involved the use tax statute now under consideration in this cause. Both of these cases involved the collection and payment provisions of the Iowa Use Tax Act as applied to the corporation's mail order business. It was the contention of respondent that the collection and payment provisions of said act as applied to their mail order business violated the 14th Amendment to the Constitution of the United States because of their extra territorial operation. It was also respondent's claim that the Use Tax Act as applied to said mail order business constituted

a regulation of and a substantial burden upon interstate commerce and hence resulted in an impairment of the free flow of such commerce. In holding both of these contentions untenable this court speaking through Justice Douglas said:

> "The Iowa Use Tax Act is complementary to the Iowa Retail Sales Tax. Iowa Code 1939, Secs. 6943.074, *et seq.* It is a tax on the use in Iowa of tangible personal property at the rate of 2% of the purchase price. 'Use', so far as material here is defined as 'the exercise by any person of any right or power over tangible personal property incident to the ownership of that property'. While the tax is imposed on 'every person using such property within this state until such tax has been paid', it is further provided that every 'retailer maintaining a place of business in this state and making sales of tangible personal property for use in this state * * * shall at the time of making such sales, whether within or without the state, collect the tax imposed by this act from the purchaser * * *'. By section 6943.112, the tax constitutes a 'debt owed by the retailer' to the state * * *. Respondent is a New York corporation authorized since 1928 to do business in Iowa. It has various retail stores there * * *."
>
> "In passing on the constitutionality of a tax law 'we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it'. (*Lawrence* v. *State Tax Commission*, 286 U. S. 276) * * *. *The fact that under Iowa law the sale is made outside of the state does not mean that the power of Iowa 'has nothing on which to operate'. Wisconsin* v. *J. C. Penney Co.* (311 U. S. 435). The purchaser is in Iowa and the tax is upon use in Iowa. The validity of such a tax, so far as the purchaser is concerned 'has been withdrawn from the arena of debate'. *Henneford* v. *Silas Mason Co.*, 300 U. S. 577 * * * It is one of the well known functions of the integrated use and sales tax to remove the buyers' temptation 'to place their orders in other states in an effort to escape payment of the tax on local sales'. *Henneford* v. *Silas Mason, supra*. As pointed out in that case (p. 582), the fact that the buyer employs agencies of interstate commerce in order to effectuate his purchase is not material since the tax is 'upon the privilege of use

after commerce is at an end' * * * Use in Iowa is what is taxed, regardless of the time and place of passing title and regardless of the time the tax is required to be paid. *McGoldrick* v. *Berwind-White Coal Min. Co.*, 309 U. S. 33."

"So the nub of the present controversy centers on the use of respondent as the collection agent for Iowa. The imposition of such a duty, however, was held NOT to be an unconstitutional burden on a foreign corporation in *Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86."

The facts in the *Montgomery Ward* case were identical to the *Sears Roebuck* case with the exception noted in the following quotation from the opinion:

"There is a further fact in this record which makes a reversal of this judgment necessary. It was stipulated that 'advertisements have been caused to be printed by the retail stores of the petitioner (Montgomery Ward & Co.) in the state of Iowa, advertising not only retail merchandise but the ability to complete service through the use of the catalogue'. This stipulation clearly means that respondent has solicited mail order sales in Iowa. *The fact that that solicitation was done through local advertisements rather than directly by local agents as in Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U. S. 62 * * * *is immaterial.* Nor is it material that the orders were filled by direct shipments from points outside the state to purchasers within the state. For that method of delivery also obtained in case of some of the orders involved in *Felt & Tarrant Mfg. Co.* v. *Gallagher, supra.*"

The above quotation demonstrates clearly, we think, how utterly untenable is the position taken by petitioner in the instant case. We reiterate that, as we view it, only by overruling the cases which we have herein cited and quoted from can the contentions of petitioner be upheld. As we have indicated, argument of the able and learned counsel for petitioner is indeed an ingenious one, yet we say that when analyzed in the light of the prior pronouncements of this court which we have herein discussed, it vanishes as does the fog before the rising sun.

CONCLUSION.

In conclusion, let us say that we are confident that this court will again construe the constitutional provisions involved in this appeal in such a manner as to "establish justice * * * * promote the general welfare * * *" of the people of the state of Iowa. We would be derelict in our duty were we to fail to call to this court's attention the disastrous results that would follow in the event petitioner's contentions are upheld. Iowa is surrounded by states some of which have not enacted a sales tax law. It does not require an acute imagination to visualize the resultant consequences. Foreign corporations would then be in a position to virtually flood this state with their representatives who would boastfully proclaim that their principal could undersell the retailers of Iowa. We "see" now circulars, letters, catalogues, hand bills, etc., impudently asserting "Buy from us. We are not subject to the Iowa Use Tax." The net result would be that the purpose for which the Iowa Use Tax was enacted would, to a considerable degree, if not entirely, be totally defeated. We think that we as citizens of Iowa have a right to ask this court to so construe the fundamental law of the land that the situation above referred to will not occur.

We invite your attention to our brief in opposition to petition for writ of certiorari in this cause and by reference we incorporate the same herein with the same effect as though it were fully set out.

Finally, we say that upon reason, logic and justice, the writ in this case should be annulled and we so respectfully ask.

JOHN M. RANKIN, Attorney General of the State of Iowa,

JENS GROTHE, Special Assistant Attorney General of the State of Iowa,

Attorneys for State Tax Commission of the State of Iowa, Respondent.

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SUPREME COURT OF THE UNITED STATES.

No. 441.—October Term, 1943.

General Trading Company, a Corporation Doing Business as Minneapolis Iron Store, Petitioner, vs. State Tax Commission of the State of Iowa.

On Writ of Certiorari to the Supreme Court of the State of Iowa.

[May 15, 1944.]

Mr. Justice Frankfurter delivered the opinion of the Court.

The State Tax Commission of Iowa brought this suit under the authority of the Iowa Use Tax Law which was recently here in *Nelson* v. *Sears, Roebuck & Co.*, 312 U. S. 359, and *Nelson* v. *Montgomery Ward*, 312 U. S. 373. The question now presented is, in short, whether Iowa may collect, in the circumstances of this case, such a use tax from General Trading Company, a Minnesota corporation, on the basis of property bought from Trading Company and sent by it from Minnesota to purchasers in Iowa for use and enjoyment there.

By the Iowa Use Tax Law a tax is "imposed on the use in this state of tangible personal property purchased . . . for use in this state at the rate of two percent of the purchase price of such property. Said tax is . . . imposed upon every person using such property within this state until such tax has been paid directly to the county treasurer, to a retailer, or to the commission . . . ." § 6943.103, Code of Iowa 1939. The use of property the sale of which is subject to Iowa's sales tax is exempted from the use tax (§ 6943.104(1)), but the sales tax can be laid only on sales at retail within the State. § 6943.075. The use tax constitutes a debt owed by the retailer to the State. § 6943.112. But "Every retailer maintaining a place of business" in Iowa must collect this tax from the purchaser (§ 6943.109), and may not advertise that he will himself absorb the tax. § 6943.111. Finally an offsetting credit (see *Henneford* v. *Silas Mason Co.*, 300 U. S. 577, 584, 586-7) if another use or sales tax has been paid for the same thing else-

where is allowed, and if the tax "imposed in such other state is two percent or more, then no tax shall be due on such articles." § 6943.125.

A judgment in favor of the Tax Commission by one of the lower courts was affirmed by the Supreme Court of Iowa, —Iowa —; 10 N. W. 2d 659. The application by that Court of its local laws and the facts on which it founded its judgment are of course controlling here. From these it appears that General Trading Company had never qualified to do business as a foreign corporation in Iowa nor does it maintain there any office, branch or warehouse. The property on which the use tax was laid was sent to Iowa as a result of orders solicited by traveling salesmen sent into Iowa from their Minnesota headquarters. The orders were always subject to acceptance in Minnesota whence the goods were shipped into Iowa by common carriers or the post. Upon these facts and its holding that Trading Company was a "retailer maintaining a place of business in this state" within the meaning of the Iowa statute, the Iowa Supreme Court held that Iowa had not exceeded its powers in the imposition of this use tax on Iowa purchasers, and that collection could validly be made through the Trading Company.

We brought the case here, 320 U. S. 731, to meet the claim that there was need for further precision regarding the scope of our previous rulings on the power of States to levy use taxes. In view, however, of the clear understanding by the court below that the facts we have summarized bring the transaction within the taxing power of Iowa, there is little need for elaboration. We agree with the Iowa Supreme Court that *Felt & Tarrant Co.* v. *Gallagher*, 306 U. S. 62; *Nelson* v. *Sears, Roebuck & Co., supra;* and *Nelson* v. *Montgomery Ward, supra,* are controlling. The *Gallagher* case is indistinguishable—certainly nothing can turn on the more elaborate arrangements for soliciting orders for an intricate machine for shipment from without a State as in the *Gallagher* case, compared with the apparently simpler needs of soliciting business in this case. And the fact that in the *Sears Roebuck* and *Montgomery Ward* cases the interstate vendor also had retail stores in Iowa, whose sales were appropriately subjected to the sales tax, is constitutionally irrelevant to the right of Iowa sustained in those cases to exact a use tax from purchasers on mail order

goods forwarded into Iowa from without the State. All these differentiations are without constitutional significance. Of course, no State can tax the privilege of doing interstate business. See *Western Live Stock* v. *Bureau*, 303 U. S. 250. That is within the protection of the Commerce Clause and subject to the power of Congress. On the other hand, the mere fact that property is used for interstate commerce or has come into an owner's possession as a result of interstate commerce does not diminish the protection which it may draw from a State to the upkeep of which it may be asked to bear its fair share. But a fair share precludes legislation obviously hostile or practically discriminatory toward interstate commerce. See *Best & Co.* v. *Maxwell*, 311 U. S. 454.

None of these infirmities affects the tax in this case any more than it did in the other cases with which it forms a group. The tax is what it professes to be—a non-discriminatory excise laid on all personal property consumed in Iowa. The property is enjoyed by an Iowa resident partly because the opportunity is given by Iowa to enjoy property no matter whence acquired. The exaction is made against the ultimate consumer—the Iowa resident who is paying taxes to sustain his own state government. To make the distributor the tax collector for the State is a familiar and sanctioned device. *Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86, 93-94; *Felt & Tarrant Co.* v. *Gallagher*, *supra*.

Affirmed.

Mr. Justice JACKSON, dissenting.

This decision authorizes in my opinion an unwarranted extension of the power of a state to subject persons to its taxing power who are not within its jurisdiction and have not in any manner submitted themselves to it. The General Trading Company is, in the language of the opinion, made "the tax collector for the tax." "We have heretofore held, and I think properly, that the state may make tax collectors of those who come in and do business within its jurisdiction, for thereby they submit themselves to its power. Such was the situation in both *Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86, and *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U. S. 62. These are the only authorities cited by the Court on this point, and they clearly are not precedents to support this decision.

In this case, as the opinion points out, the General Trading Company never qualified in Iowa and has no office, branch, warehouse, or general agent in the State. From Minnesota it ships goods ordered from salesmen by purchasers in Iowa. Orders are accepted only in Minnesota. The transaction of sale is not taxed and, being clearly interstate commerce, is not taxable. *McLeod* v. *Dilworth Co.*, No. 311, decided today. So we are holding that a state has power to make a tax collector of one whom it has no power to tax. Certainly no state has a constitutional warrant for making a tax collector of one as the price of the privilege of doing interstate commerce. He does not get the right from the state, and the state cannot qualify it. I can imagine no principle of states' rights or state comity which can justify what is done here. Nor does the practice seem conducive to good order in the federal system. The power of Iowa to enforce collection in other states is certainly very limited and the effort to do so on any wide scale is unlikely either to be systematically pursued or successfully executed.

I recognize the pressure to uphold all manner of efforts to collect tax moneys. But this decision, by which one may not ship goods from anywhere in the United States to a purchaser in Iowa without becoming a nonresident tax collector, exceeds everything so far done by this Court. In my opinion the statute is an effort to exert extraterritorial control beyond any which a state could exert if there were no Constitution at all. I can think of nothing in or out of the Constitution which warrants this effort to reach beyond the State's own border to make out-of-state merchants tax collectors because they engage in interstate commerce with the State's citizens.

Mr. Justice ROBERTS joins in this opinion.